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NO. 06-562

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE OF THE STATES OF WASHINGTON, ALABAMA, ALASKA, ARKANSAS, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OREGON, RHODE ISLAND, TENNESSEE, TEXAS, UTAH, VERMONT, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA, AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675, imposes liability on a number of persons for costs of cleaning up property contaminated by hazardous substances. Can a person who is liable under Section 107(a) bring a cause of action against another liable person to recover "necessary costs of response" as provided for in Section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B)?

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I. INTEREST OF AMICI CURIAE

The State of Washington, together with thirty-seven other Amici Curiae States, the District of Columbia, and the Commonwealth of Puerto Rico, respectfully urge affirmance of the Eighth Circuit Court of Appeals decision in *Atlantic Research Corporation v. United States*, 459 F.3d 827 (8th Cir. 2006), holding that Section 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675[1], provides a right of cost recovery for parties liable under CERCLA who have voluntarily cleaned up contamination.

There are thousands of sites across the country contaminated by hazardous substances harmful to human health and the environment. The Environmental Protection Agency (EPA) estimates that there are approximately 450,000 commercial and industrial cleanup sites nationwide.[2] By way of example, 3,138 sites are listed on the State of Washington's Confirmed and Suspected Contaminated Sites List and 1,249 confirmed sites

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[1] To provide references consistent with those in the Brief For The United States, the Amici States' brief uses CERCLA citations rather than United States Code citations. Thus, 42 U.S.C. § 9601 is CERCLA § 101 or Section 101.

[2] Information regarding the number of contaminated sites in the United States is available via EPA's website. EPA, *The Facts Speak for Themselves: A Fundamentally Different Superfund Program* (Nov. 2006), *available at* http://www.epa.gov/superfund/whatissf/sf_fact4.pdf (visited Apr. 4, 2007).

have been prioritized by the State.[3] *See also infra* note 21 (discussing the number of sites reported by the Department of Defense).

Congress passed CERCLA in 1980 to address the legacy of this contamination. CERCLA gives the States important roles in addressing contaminated sites. States participate in the planning, selection, and implementation of remedial actions. CERCLA § 121(f); 40 C.F.R. §§ 300.500–300.525 (2005). For example, EPA may not take remedial action under CERCLA unless the State in which a release occurs enters into a contract or cooperative agreement with the federal government.[4] CERCLA § 104(c)(2)–(3). EPA may defer listing an eligible site on the National Priority List if a State is conducting cleanup or another party is conducting cleanup under a State's oversight. CERCLA § 105(h)(1). This congressional recognition of the role of States in the cleanup of contaminated sites supports strong consideration of the views of the Amici States. *See also* Brief For The United States (U.S. Br.) 4 n.3 (acknowledging the role of the States in providing review and oversight at many CERCLA sites).

The Amici States work on the front lines with regard to cleaning up contaminated property,

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[3] Information regarding Washington sites is available at http://www.ecy.wa.gov/programs/tcp/cscs/cscspage.htm. *See also Model Toxic Control Accounts Fiscal Year 2005 Annual Report* (Oct. 2006), *available at* http://www.ecy.wa.gov/biblio/0509095.html (visited Apr. 4, 2007).

[4] The President delegated most of his CERCLA authority to the EPA via Executive Order No. 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987).

improving local communities, and protecting the public health. Amici States are therefore vitally interested in ensuring that CERCLA is properly construed to promote its goal of expeditious cleanup action with respect to as many contaminated sites as practicable, and to avoid unnecessary and inefficient use of limited state resources. These state interests would be compromised if, as the United States urges, CERCLA's cost recovery remedies are unavailable to potentially liable persons who take appropriate voluntary response actions to address contamination. The State of Washington, for example, oversees many cleanups using administrative orders and consent decrees. But the majority of hazardous waste sites in Washington are cleaned voluntarily by potentially liable parties using expert contractors applying state and federal cleanup standards.[5] If CERCLA is not construed to include the incentive of reasonable recovery of cleanup costs in the common scenario where a liable party voluntarily incurs costs of cleanup, then contaminated property will remain unused and unproductive, and will endanger human health and the environment for a longer time.

II. SUMMARY OF ARGUMENT

The United States' contention that Section 107(a)(4)(B) allows only "innocent" persons to

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[5] *See also, e.g.*, Senate Journal, 24th Leg., 2nd Sess., at 2189–90 (Alaska 2006), *available at* http://www.legis.state.ak.us/basis/get_jrn_page.asp?session=24&bill=HB269&jrn=2189&hse=S (visited Apr. 4, 2007) ("Voluntary cleanups form the vast majority of cleanups conducted in the state of Alaska."); Wisconsin Dep't of Natural Res., *Voluntary Party Liability Exemption available at* http://www.dnr.state.wi.us/org/aw/rr/liability/purchasers_0.html (visited Apr. 4, 2007).

recover response costs voluntarily incurred at a contaminated site is incompatible with CERCLA's plain language and statutory scheme. The United States argues that "any other person" refers to any person not listed in Section 107(a)(1) through (4). The United States' argument asks this Court to ignore the far more obvious meaning of the words "any other person" as referring to persons other than the governmental parties identified by the immediately preceding subsection.

Section 107(a)(4)(A) provides that the United States, a State, or an Indian tribe may recover their cleanup costs from persons liable under Section 107(a)(1) through (4). Section 107(a)(4)(B) then provides that "any other person" may similarly recover cleanup costs from persons liable under Section 107(a)(1) through (4). In context, "any other person" in Section 107(a)(4)(B) does not mean only "innocent" persons, as the federal government argues; rather, it means any persons other than those mentioned in the preceding Section 107(a)(4)(A). This construction of Section 107(a)(4)(B) is consistent with this Court's emphasis in other cases that the most sensible reading of referential words like "any other person" is that they refer to the last antecedent. Here, Section 107(a)(4)(B) refers to, and thus differentiates, response costs incurred by government persons from response costs incurred by non-government persons.

Moreover, liability under Section 107(a) is "subject only to the defenses" set forth in Section 107(b). Those defenses allow the United States or other persons to avoid liability by showing that another person was the "sole cause" of the release.

The United States' argument essentially creates a new defense to liability, where it avoids liability by proving that the plaintiff seeking cost recovery is partly liable for the site. The United States' argument that Section 107(a)(4)(B) does not apply because a contribution action under Section 113(f) is the exclusive means of cost recovery for liable parties, also ignores the introduction language of Section 107(a) providing that it applies "notwithstanding any other provision or rule or law." Finally, the United States' argument is also contrary to EPA's past interpretations, which never limited the right to seek response costs to "innocent" persons as now urged by the United States.

In addition to straining the statutory language, the United States' construction frustrates the purposes of CERCLA previously recognized by this Court—to promptly clean up contaminated sites and to ensure that all liable persons pay for the cleanup. A reading that only "innocent" persons may recover their response costs decreases the number of contaminated sites that will be addressed voluntarily. Construing Section 107(a)(4)(B) to provide a cost recovery claim for *all* persons who voluntarily address contamination, including persons who may be liable under Section 107(a)(1) through (4), promotes more expeditious cleanup and fulfills CERCLA's purpose to impose costs broadly.

The United States' interpretation of Section 107(a)(4)(B), if accepted, also would create a serious tension for the United States in its dual role as liable party and enforcement agency. According to the United States, a liable person's CERCLA remedy is limited to contribution under Section 113(f). But as

this Court ruled in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), Section 113(f) applies only when persons are subject to suits under Sections 106 and 107, or settle their liability with the state or federal government. As the court below recognized, because the United States has control over such civil suits and settlements, the United States could exercise its enforcement discretion to insulate liable federal agencies from CERCLA contribution claims. This result not only creates an odd tension, it conflicts with Section 120(a)(1) where Congress provided that the United States "shall be subject to, and comply with, [CERCLA] . . . to the same extent" as any private party.

Finally, the United States cannot support its argument that cost recovery by a liable party under Section 107(a) would come at the expense of government powers or priorities. Limiting cost recovery to Section 113(f), however, would affect the ability of Amici States to focus their limited resources on the most significant contaminated sites. A voluntary cleanup may be financially feasible only if the party who incurs costs knows that he or she can recover costs from other liable parties. If cost recovery is not available under Section 107(a)(4)(B), parties ready to conduct voluntary cleanups may refuse and press for state enforcement actions in order to have Section 113(f) contribution rights. As a result, Amici States will be pressured to shift limited legal and program staff resources to lower priority sites, or risk losing the benefit of prompt voluntary cleanups consistent with the national contingency plan.

III. ARGUMENT

A. Section 107(a)(4)(B) Provides A Right Of Cost Recovery For Liable Persons Who Voluntarily Incur Response Costs

Section 107(a)(4)(A) through (D) identify who may recover various cleanup related costs and damages from liable persons. Section 107(a)(4)(A) provides that persons identified in Section 107(a)(1) through (4) are liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." The immediately following subsection, Section 107(a)(4)(B), authorizes recovery of "any other necessary costs of response incurred by any other person consistent with the national contingency plan."

The principal question in this case is whether the phrase "any other person" in Section 107(a)(4)(B) refers to persons other than those referenced in the immediately preceding subsection, i.e., "the United States Government or a State or an Indian tribe," as the Amici States submit; or whether "any other person" refers to a far narrower class of persons, i.e., only non-liable private parties, as the United States contends. The United States describes the narrow class of "other persons" who have a cause of action under Section 107(a)(4)(B) as "innocent" parties. U.S. Br. 16.

1. The United States' argument should be rejected based on fundamental principles of statutory construction beginning with the principle "that the starting point for interpreting a statute is the

language of the statute itself." *Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The language at issue, read naturally, means that taken together, Section 107(a)(4)(A) and (B) include all persons who have incurred necessary response costs.

Section 107(a) begins with subsections (1) through (4) describing four types of liable persons. Any and all of these four types of persons "shall be liable for":

> "(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> "(B) *any other necessary costs of response incurred by any other person* consistent with the national contingency plan;
>
> "(C) [certain damages to natural resources]; and
>
> "(D) [certain health assessments]." CERCLA § 107(a)(4) (emphasis added).[6]

The natural reading of the phrase "any other person" who "incurred" costs is that it refers to persons other than those mentioned in the immediately preceding subsection (A), i.e., the United States government or a State or an Indian

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[6] The codification suggests that clauses (A) through (D) are subsections of Section 107(a)(4). However, the text unambiguously shows that the liabilities in (A) through (D) apply to each of the persons described in Section 107(a)(1) through (4).

tribe. These governmental actors are each likely to incur response and remediation costs, but they are not the only parties who may incur such costs. Subsection (B) therefore addresses "any other person" who incurred response costs and similarly provides a "cause of action" against liable persons identified in Section 107(a)(1) through (4).

Part of considering plain language is this Court's recognition that "'[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.'" *Barnhardt v. Thomas*, 540 U.S. 20, 26 (2003) (quoting 2A N. Singer, *Sutherland on Statutory Construction* § 47.33, p. 369 (6th rev. ed. 2000)). As recognized in *Barnhardt*, this rule is not absolute. But here, no other indicia of meaning in Section 107 overcome this rule. Moreover, Section 107(a)(4)(B)'s reference to the immediately preceding subsection is confirmed by the parallel structure of the two subsections—one imposes liability for "costs" incurred by government persons and the next imposes liability for "any other" costs incurred by "any other persons."

2. It is difficult to imagine broader words than used in Section 107(a)(4)(B), which provides a cause of action for "*any other* necessary costs of response incurred by *any other* person." (Emphasis added.) This is a natural and expansive description of response costs not covered by Section 107(a)(4)(A).[7] It contradicts common sense for

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[7] A fair reading of "any" also supports the Amici States' reading that all CERCLA "persons" may seek recovery under Section 107(a)(4)(B). *See New York v. EPA*, 443 F.3d 880,

Congress to use such expansive words if, as the United States contends, Congress meant to limit who could seek response costs from other liable persons. Use of the expansive words "any other person" therefore refers to all "persons" within CERCLA's definition of person, other than those persons specifically identified in Section 107(a)(4)(A). *See* CERCLA § 101(21).

This natural reading of Section 107(a) led the Seventh Circuit to reach the same conclusion in *Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F.3d 824 (7th Cir. 2007). The Seventh Circuit opinion thoroughly examines CERCLA and the Superfund Amendments and Reauthorization Act (SARA), relying on this Court's statement in *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 (1994), that "§ 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs." *Metro. Water*, 473 F.3d at 831 (quoting *Key Tronic*, 511 U.S. at 818). The opinions of the Seventh, Second[8], and Eighth Circuits each

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885–86 (D.C. Cir. 2006) (applying this Court's precedents for the propositions that each word in a statute must be given effect and "any," read naturally, has expansive meaning); *see also Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980) ("any other action" language in the Clean Air Act is broad and encompasses any final action by the EPA Administrator, similar to those enumerated in preceding provisions).

[8] *See Consol. Edison Co. of New York, Inc. v. UGI Utils., Inc.*, 423 F.3d 90, 99–100 (2d Cir. 2005) (finding no basis for reading into Section 107(a)(4)(B) a requirement that the person seeking cost recovery be an "innocent" party); *cf. E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515 (3d Cir. 2006) (split panel decision applied but would not reconsider Third

provide sound reasons to reject the United States' argument that "any other person" under Section 107(a)(4)(B) bars a Section 107 cost recovery action by liable persons identified in Section 107(a)(1) through (4).[9]

3. The United States' reading of the words "any other person" in Section 107(a)(4)(B) is also at odds with the language of Section 107, which strictly limits the defenses available in a cost recovery action. Under Section 107(a), a person is liable "subject only to the defenses set forth in subsection (b) of this section." Section 107(b) provides a defense to "a person otherwise liable" if the person proves it was not negligent and the *sole cause* of the release of contamination was the act of an independent third party, an act of God, an act of war, or a combination of such causes.

Despite this language strictly limiting the defenses available to a "person otherwise liable" the United States, as an otherwise liable party under Section 107(a)(1) through (4), contends that Section 107(a)(4)(B) frees it from liability whenever a third party—the plaintiff in a cost recovery action—has any liability for the contamination under Section 107(a)(1) through (4). It makes little sense for

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Circuit precedent and held that a liable party could not use Section 107(a)(4)(B) for cost recovery).

[9] While *Cooper Industries* noted that the Court's discussion of cost recovery in *Key Tronic* was not a holding, the Court nonetheless "undertook a comprehensive discussion of the rights of action available under CERCLA." *Metro. Water*, 473 F.3d at 832. Indeed, the party seeking recovery (Key Tronic) was itself a liable person under Section 107(a).

Congress to tightly limit defenses to liability by imposing a demanding burden of proof in Section 107(b), but then allow an otherwise liable party to escape liability for cost recovery under Section 107(a)(4)(B) by making the far easier showing that the plaintiff has some joint liability at the site.

The Court should not insert an additional defense into CERCLA based on the United States' strained reading of Section 107(a)(4)(B). Given the clear language of Section 107(a) that the only defenses to liability are found in Section 107(b), the Court should reject the United States' theory that only "innocent" parties can recover costs of response under Section 107(a).

4. The United States' argument that Section 113(f) is the exclusive means for liable persons to seek cleanup costs from other liable persons also is inconsistent with the language of Section 107(a). In construing Section 113(f), the Court emphasized that it should be read in context, considering surrounding sections. *See Cooper Indus.*, 543 U.S. at 166–67. By its terms, Section 107(a), applies "notwithstanding any other provision or rule of law," which would include Section 113(f). Section 107(a) provides for "an action under this section." Under the same rule applied in *Cooper Industries*, Section 113(f) should not be read to foreclose a right of recovery under Section 107(a)(4)(B), as the United States contends. Rather, Section 113(f) provides for a distinct remedy of contribution among liable parties. *See Cooper Indus.*, 543 U.S. at 162–63; *see also Cooper Indus.*, 543 U.S. at 167–68 (savings language in Section 113(f) "rebuts any presumption that the express right of contribution provided . . . is

the exclusive cause of action for contribution available to a PRP").

The United States' argument that Section 113 is an exclusive remedy is further undercut by its failure to explain why Congress would decide to make "innocence" (in the United States' vernacular) a necessary qualification to bring a cost recovery action under Section 107(a)(4)(B), but then turn around under Section 113 and provide a contribution right for parties who, by definition, are not "innocent." A more logical conclusion is found in Section 113(f)'s express reference to particular actions under Section 106 and Section 107(a), which confirms that contribution is a distinct, supplemental remedy.

The United States argues that Section 113(f) is a specific statutory remedy that preempts a "general" remedy of Section 107(a). U.S. Br. 27. Section 113(f), however, provides a distinct and additional remedy that is expressly tied to Section 107(a). In contrast, the cases cited by the United States are inapposite, rejecting the use of general remedies such as § 1983[10] when Congress provides a separate statutory scheme to address a specific problem.[11] Atlantic Research did not use a general

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[10] 42 U.S.C. § 1983.

[11] *See Prieser v. Rodriguez*, 411 U.S. 475, 488–89 (1973) (attack on detention under a judicial order must proceed under habeas corpus; 42 U.S.C. § 1983 not applicable to deprivation of good time credits); *Block v. North Dakota*, 461 U.S. 273, 285 (1983) (the Quiet Title Act of 1972, 28 U.S.C. § 2409a, provides exclusive remedy for quiet title and precludes mandamus suits against federal officers); *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 835 (1976) (Civil Rights Act of 1964, as amended, provides

remedy like § 1983 to bypass CERCLA and the principle argued by the United States is not applicable to Section 107(a)(4)(B).

Finally, there is a straightforward answer to the United States' argument that Section 107(a)(4)(B) would create cost recovery rights free from a statute of limitations applicable to contribution claims. U.S. Br. 30–31. Section 113(g)(2) provides a statute of limitations for "[a]ctions for recovery of costs." Admittedly, that section is complex, but it unambiguously applies to Section 107(a) claims.[12]

5. The United States' argument would lead to another incongruous result, a result inconsistent with Section 120(a)(1). When CERCLA was amended and reauthorized by SARA, Congress

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exclusive judicial remedy for discrimination claims in federal employment, precluding jurisdiction under declaratory judgment acts or other federal law); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) (judicial remedy expressly authorized by Telecommunications Act, 47 U.S.C. § 332(c)(7) precludes inconsistent remedies using § 1983).

[12] The United States also quotes legislative history to argue that when adopting SARA, Congress assumed that liable persons could not pursue cost recovery under Section 107(a). *See* U.S. Br. 29. The statement cited by the United States carries no such implication. A congressional committee stated that SARA would not affect the United States' ability to maintain a cause of action under Section 107(a). This does not necessarily imply, as urged by the United States, that cost recovery by liable persons other than the United States was unavailable under Section 107(a). Nor does it imply that such cost recovery actions would "not survive the enactment of Section 113(f)." U.S. Br. 29.

made it clear that the United States was subject to CERCLA just as any other entity:

> "Each department, agency and instrumentality of the United States . . . shall be subject to . . . this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity. . . ." CERCLA § 120(a)(1).

Under Section 107(a)(4)(A), the United States may recover response and remedial action costs at a site even if it is a liable party. But the United States argues that Congress did not apply CERCLA "in the same manner and to the same extent" to "nongovernmental entit[ies]." CERCLA § 120(a)(1). Rather, the United States argues that Congress made precisely the opposite public policy choice for nongovernmental liable persons, foreclosing cost recovery under Section 107(a). The United States cannot explain how its preferred result squares with Section 120(a)(1), quoted above.

For many years, this Court has pointed out that the purpose of CERCLA's liability scheme and its remedies is to allow cleanup costs to be shared by all responsible parties. *See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989), *overruled on other grounds, Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) ("The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.") (Brennan, J., plurality opinion); *see also* U.S. Br. 2 (recognizing the "two goals" of

CERCLA as providing for cleanup of hazardous substances and "to hold responsible parties liable for the costs of these clean-ups"). Allowing liable persons to pursue cost recovery claims under Section 107(a)(4)(B) advances CERCLA's purpose. By contrast, the United States' argument frustrates CERCLA's fundamental plan of promoting cleanups by allowing equitable sharing of cleanup costs.

The incongruous results urged by the United States should be rejected. The United States is subject to CERCLA "in the same manner and to the same extent" as any nongovernmental entity. CERCLA § 120(a)(1).

6. The United States' argument is also contrary to the long-held positions of the federal agency charged with enforcing CERCLA. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988) (declining to give weight to federal government's interpretation where it was inconsistent with prior interpretation); *see also Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003) ("administrative interpretations . . . not [the] products of formal rulemaking . . . nevertheless warrant respect").[13]

In 1984, EPA adopted a CERCLA settlement policy recognizing that administrative and

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[13] To be clear, in the view of the Amici States, Section 107(a)(4)(B) is unambiguous and it is not necessary to resort to EPA's view of its meaning. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Coun., Inc.*, 467 U.S. 837, 865–66 (1984). However, if the Court disagrees, EPA's statements and actions mirror the Amici States' position.

enforcement "litigation will not be sufficient to accomplish CERCLA's goals, and that voluntary cleanups are essential to a successful program for cleanup of the nation's hazardous waste sites." EPA stated that it is "preferable for private parties to conduct cleanups themselves." EPA, *Interim CERCLA Settlement Policy*, 50 Fed. Reg. 5034, 5035 (Feb. 5, 1985).

In 1990, EPA added Subpart H to the National Contingency Plan (NCP) to address how voluntary parties can recover costs from other parties. *See* 40 C.F.R. pt. 300, subpt. H. (2006). EPA explained first that the "focus of" Subpart H "is on those authorities of CERCLA that allow persons other than governments to respond to releases and recover response costs." *National Oil and Hazardous Substances Pollution Contingency Plan*, 55 Fed. Reg. 8666, 8792 (Mar. 8, 1990). Section 107(a)(4)(B) "establishes a right of action . . . for cost recovery in those cases where non-governmental parties have incurred necessary response costs consistent with the NCP." 55 Fed. Reg. at 8796. EPA construed Section 107(a) to "encourage private parties to perform *voluntary* cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination." 55 Fed. Reg. at 8792–93 (emphasis added).

In its regulations, EPA provides a "summary" of the "mechanisms available to recover the costs of response actions under CERCLA." 40 C.F.R. § 300.700(b). The regulation provides for cost recovery by "any other persons," and subsection (5) of that section provides detailed directions for "private

party response actions" and does not reference whether the private party is "innocent." 40 C.F.R. § 300.700(c).

B. Denying Recovery Of Response Costs Under Section 107(a)(4)(B) Will Frustrate Voluntary Cleanups And Defeat The Core Purposes Of CERCLA

1. This Court has recognized that Congress enacted CERCLA to remedy the serious environmental and health risks posed by pollution. *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998). Further, one of the main purposes of CERCLA is to promptly clean up hazardous waste sites. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (citing with approval *Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990)). Prompt cleanup of hazardous waste sites is furthered by construing Section 107(a)(4)(B) reasonably to allow all responding parties to seek recovery of cleanup costs. If voluntary actors who remediate hazardous waste sites cannot seek recovery of costs, CERCLA's purpose of prompt clean up will be frustrated. *See* Michael P. Vandenbergh, *The Private Life of Public Law*, 105 Colum. L. Rev. 2029, 2089–90 (2005) (former EPA Chief of Staff explaining that without a private right of action under CERCLA, "far fewer Superfund cleanup actions will occur and that the public fisc will bear the enforcement costs of those that do").

Cost recovery is thus a critical incentive for voluntary cleanup actions. *See, e.g.*, ABA, Luis Nido & Jason Hutt, *Voluntary Cleanups-Alive after Aviall?*

20 Nat. Resources & Env't (Fall 2005) ("voluntary cleanups are likely to be adversely affected by [*Aviall*]. . . . [M]any sites that would have been cleaned up voluntarily . . . now are likely to linger unattended . . . ."); Donn L. Calkins, *CERCLA Contribution Actions After Cooper v. Aviall*, 34 Colo. Law. 99, 103 (Sept. 2005) ("For the time being, the voluntary cleanup of hazardous waste sites by PRPs must be considered ended—at least for PRPs hoping to recover a portion of their cleanup costs.").[14] As explained in *Metropolitan Water*:

> "Were a cost recovery action unavailable in these circumstances, the Second Circuit reasoned, 'such parties would likely wait until they are sued to commence cleaning up any site for which they are not exclusively responsible because of their inability to be reimbursed for cleanup expenditures in the absence of a suit.'" *Metro. Water*, 473 F.3d at 836 (quoting *Consol. Edison Co. of New York v. UGI Utils., Inc.*, 423 F.3d 90, 100 (2d Cir. 2005)).

As illustrated by *Metropolitan Water*, there are significantly contaminated sites where the government has taken no enforcement action, and where cost recovery remains a key incentive for voluntary

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[14] *See also* Joseph Ferrucci, *No Contribution Claims for Voluntary Cleanups of Superfund Sites: The Troubling Supreme Court Decision in Cooper Industries v. Aviall Services*, 12 Hastings W.-N.W. J. Envtl. L. & Pol'y 73 (Fall 2006); Callie Campbell, Note, *Cooper Industries, Inc. v. Aviall Services, Inc.: A Superfast End to Voluntary Cleanups and Efficient Environmental Management*, 13 Southeastern Envtl. L.J. 203 (Spring 2005).

responders.[15] *See Metro. Water*, 473 F.3d at 837 ("In the present case, the EPA simply is not in the picture and has no reason to purse [sic] a settlement.").[16]

2. The United States implies that only voluntary cleanups resulting from a negotiated settlement with the government advance CERCLA's purposes. U.S. Br. 41. The United States argues that by adopting SARA to codify contribution rights in Section 113(f), Congress intended to discourage independent cleanups in favor of government settlements. U.S. Br. 42.[17] The United States wades through CERCLA and SARA legislative history to support this contention, but even after this effort, the United States points to nothing where Congress expressed that view.[18]

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[15] The plaintiff in *Metropolitan Water* is a governmental entity, but is not a "state" under Section 107(a)(4)(A) and does not take enforcement action.

[16] In addition to removing cost recovery under Section 107(a) as an incentive for voluntary cleanup by liable persons, the United States' interpretation of Section 107(a) would inevitably chill "innocent" parties from incurring response costs. Even presumptively innocent persons would rationally hesitate to incur response costs when faced with the risk of costly litigation that might later conclude that the person is not "innocent" under the broad categories of Section 107(a)(1) through (4) or the demanding defenses of Section 107(b).

[17] The United States concedes that the legislative history of SARA "does contain references to the desirability of voluntary cleanups." U.S. Br. 41.

[18] The most telling legislative history directly contradicts the interpretation offered by the United States. *See* H.R. Rep. No. 96–1016, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6136 ("to provide a mechanism for prompt recovery of monies expended for the costs of [remedial actions] from persons

For reasons previously discussed, resort to legislative history is unnecessary because the natural reading of Section 107(a)(4)(B) supports a right of cost recovery for liable and non-liable persons. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there").

Moreover, the United States' interpretation of legislative history starts from a false premise. It argues that independent or voluntary cleanups will occur "at the expense" of cleanups overseen by the government. U.S. Br. 41–42. The United States does not demonstrate how this would be so. The legislative history explored by the United States, read fairly, confirms congressional support for voluntary cleanups. It does not support the United States' theory that settlements with the United States would be impaired simply because a party who independently cleans up a contaminated site consistent with the NCP may recover some costs from other liable persons under Section 107(a)(4)(B).

The United States' argument cannot overcome the simple fact that CERCLA allows the federal government to take enforcement actions or to engage liable persons in settlement discussions as it chooses. The potential for a claim under Section 107(a)(4)(B) does not impair these enforcement powers of the government.

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responsible therefore and to induce such potentially liable persons to pursue appropriate environmental response actions voluntarily.")

3. The United States' argument is also undercut by the fact that CERCLA contains safeguards ensuring that voluntary cleanups are conducted properly before response costs can be recovered. Cost recovery is limited to response costs "consistent with the national contingency plan." CERCLA § 107(a)(4)(B). Response costs also must be "necessary." CERCLA § 107(a)(4)(B). Response costs that are "necessary" and are "consistent with the" NCP are matters of settled CERCLA law. *See Regional Airport Auth. of Louisville v. LFG, L.L.C.*, 460 F.3d 697, 703–04, 706–07 (6th Cir. 2006) (costs are necessary where there is an actual or real threat to human health or the environment, and costs are consistent with the NCP where they are in substantial compliance with the NCP); *see also* 40 C.F.R. § 300.700(c)(3) (detailed guidance for private parties regarding consistency with the NCP for response actions under Section 107(a)(4)(B) to ensure "a CERCLA-quality cleanup"). Thus, to be eligible for cost recovery under Section 107(a)(4)(B), a voluntary cleanup must comport with the government's regulatory scheme.

C. CERCLA Should Be Interpreted To Avoid Creating A Serious Tension Within The Federal Government If Section 113(f) Is The Only CERCLA Remedy For Liable Persons

As noted by the court of appeals below, if Section 113(f) is the only remedy for a liable party, then the federal government could "insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." *Atlantic*

Research, 459 F.3d at 837. As this Court has held, Section 113(f) provides for contribution "only 'during or following' a civil action under § 106 or § 107(a)." *Cooper Indus.*, 543 U.S. at 168. Thus, CERCLA is structured so that the United States has significant control over these preconditions for a Section 113(f) contribution claim. To illustrate this control, the cleanup costs of a responsible party can be memorialized in a consent decree under Section 106, but only if the United States agrees. If the United States does not exercise enforcement authority under Section 106 or Section 107, the responsible party will be unable to file a Section 113(f) contribution claim. Such a liable person will have no remedy unless Section 107(a)(4)(B) allows it to recover those response costs. Thus, the United States can largely control whether a liable party has a Section 113(f) remedy to recover costs from other liable parties.[19]

1. The United States does not deny that its reading of CERCLA would create this tension; it responds by saying "[t]here is no factual basis to support" the suggestion of the court below that it would actually implement CERCLA in this fashion. U.S. Br. 44. The United States' response, however, fails to confront the statutory interpretation issue. It would be odd for Congress to incorporate this potential conflict into CERCLA, given the law's overriding concern with promoting cleanup of hazardous waste sites. CERCLA need not and

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[19] An exception would be those instances where a state uses CERCLA to bring a Section 107(a) action or settle with the responsible party under Section 113(f)(3)(B). The effect of this alternative on the states is discussed in Section III.D., below at page 25.

should not be interpreted to create this tension between the regulatory responsibility of the United States and the financial interests of federal agencies who are liable parties at contaminated sites.

2. The facts of *Atlantic Research* illustrate why Amici States raise this concern. Before this Court decided *Cooper Industries*, the United States, as a potentially liable party, and Atlantic Research were negotiating a financial settlement that would have reimbursed Atlantic Research for the government's share of the cleanup. *See Atlantic Research*, 459 F.3d at 829. However, when *Cooper Industries* made it clear that Section 113(f) was not available if there was no Section 106 or Section 107 civil action, the United States ceased negotiations and contended that Atlantic Research had no remedy—it could not pursue Section 113(f) contribution, and Section 107(a)(4)(B) was unavailable. *Atlantic Research*, 459 F.3d at 829–30.[20]

This history of dealings in *Atlantic Research* is not offered to suggest the United States' motive in ceasing negotiations. It simply illustrates the tension in CERCLA that results if the federal government can avoid cost recovery from another liable party under Section 107(a)(4)(B), and Section 113(f) is the sole remedy for liable parties.

3. It is vital that the right of cost recovery provided for by Section 107(a)(4)(B) is available at the thousands of hazardous waste sites where the

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[20] The record does not indicate that the United States had any defense to liability under Section 107(a) or (b).

United States is potentially responsible under Section 107(a).[21] The federal government's liability under CERCLA is provided by Section 120(a). A right of cost recovery to liable parties under Section 107(a)(4)(B) fulfills the United States' avowed position that the federal government seeks a level playing field under CERCLA.[22] The playing field is not level if Section 113(f) is the sole CERCLA remedy when a liable person undertakes a voluntary cleanup.

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[21] According to EPA, there are 172 federal facilities on the National Priorities List (NPL), which is 12.7 percent of all NPL sites. However, these NPL sites represent only a small fraction of the total number of contaminated sites for which the United States is liable under CERCLA. For example, according to the Department of Defense's 2006 Defense Environmental Restoration Program Report, *available at* https://www.denix.osd.mil/denix/Public/News/OSD/DEP2006/deparc2006.html (visited Apr. 4, 2007), within the Department of Defense there are 4,875 active installations, 2,173 formerly used defense sites, and 1,230 base realignment and closure sites that need investigation or remedial action, a total of 8,278 sites.

[22] In an October 4, 2001, letter, former EPA Administrator Whitman described the United States' position as "commit[ted] to a level playing field between Federal agencies and departments and the private sector. Americans rightfully expect their government to abide by the same environmental laws and standards as private business . . . ." Letter from Christine Todd Whitman, EPA, to James M. Jeffords, United States Senate (Oct. 4, 2001) *available at* http://www.epa.gov/compliance/federalfacilities/ (visited Apr. 4, 2007) (click on link to .pdf of letter).

D. State Discretion To Direct Limited Resources Will Be Undermined If Cost Recovery Requires A Contribution Right Under Section 113(f)

If there is no cost recovery right for responsible persons under Section 107(a)(4)(B), financial limitations will affect how private actors and local governments address contaminated sites. As this Court observed in *Key Tronic*, 511 U.S. at 820, the addition of responsible parties at a site "increases the probability that a cleanup will be effective and get paid for."

Without cost recovery under Section 107(a), willing parties who would voluntarily clean up contaminated sites will seek state settlements or state legal action to satisfy the prerequisites to seeking contribution under Section 113(f). This creates a very real concern that the Amici States will be requested to redirect their limited resources to sites where they otherwise would not be needed. And it raises the very real likelihood that, unless the Amici States agree, the sites at issue will remain contaminated. Rather than focus on the highest risk cleanup sites, the Amici States will be pressed to shift resources to sites where persons are willing to conduct voluntary cleanups, but now seek state involvement to ensure access to Section 113(f) contribution rights.[23]

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[23] States' hazardous waste programs generally focus on hazardous waste sites presenting the greatest danger to human health and the environment. *See, e.g.*, Wash. Admin. Code 173-340-320 (providing a scheme for assessing and ranking hazardous waste sites).

The choice will have real consequences for the Amici States. If the State does not take enforcement action or enter into a settlement at the request of a liable person willing to undertake a voluntary cleanup, that cleanup may be financially impossible. This will result in fewer cleanups across the country, including "brownfield" cleanups.[24] On the other hand, if the State chooses to dedicate its resources to voluntary cleanups, it will have diminished resources available to address higher-risk sites.

As an example, following this Court's *Cooper Industries* decision, the state of Washington was asked to take action at a site where the United States is a liable person but has not taken any enforcement actions. The former Atomic Energy Commission bus lot site is located in Richland, Washington, near the Hanford Nuclear Reservation. The site is contaminated from use by the Atomic Energy Commission, the predecessor of the Department of Energy, in the 1940–50s as a vehicle maintenance facility. Battelle Memorial Institute now owns the site and seeks to redevelop it to create additional research facilities. Prolonged negotiations with the United States came to an impasse after *Cooper Industries* and the United States informed Battelle that it must seek a settlement under Washington's cleanup law to facilitate a contribution

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[24] CERCLA defines a "brownfield site" to be "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." CERCLA § 101(39)(A).

claim against the United States under Section 113(f)(3)(B).[25]

The Battelle bus lot example also contradicts the United States' speculation that increased property values stemming from remediation will create a sufficient incentive to fulfill CERCLA's goals. U.S. Br. 43. The costs of remediation depend on the nature and extent of the contamination. They are not a function of the market value of the property and can easily exceed that value. In such scenarios, the availability of cost recovery from other liable parties, including the United States, will determine whether a cleanup is financially feasible. Equally important, the United States' speculation is contrary to CERCLA's goal that everyone liable should contribute to the costs of cleanup. *Union Gas Co.*, 491 U.S. at 21.

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[25] The United States may suggest that state law can provide additional recovery of costs between liable parties and thus address the concerns of Amici States. Many state hazardous waste cleanup laws provide contribution and cost recovery rights. *See, e.g.*, Wash. Rev. Code § 70.105D.080. CERCLA, however, is the only certain remedy for former federal facilities. That is because the United States has not agreed that state cleanup laws apply to former federal facilities. *See* CERCLA § 120(a)(4) (waiving sovereign immunity of the United States to state laws "concerning removal and remedial action . . . at facilities owned or operated by a department, agency, or instrumentality of the United States" and not on the NPL). *Compare Crowley Marine Servs., Inc. v. Fednav, Ltd.*, 915 F. Supp. 218 (E.D. Wash. 1995) (holding that waiver in Section 120(a)(4) only applies to sites currently owned or operated by government) *with Tenaya Assocs. Ltd. P'ship v. U.S. Forest Serv.*, 1995 WL 433290 (E.D. Cal. 1993) (holding that Section 120(a)(4) waiver applies to sites previously owned by the government).

IV. CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED.

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